Cultural Visions and Constitutional Reforms in Canada in the 1980s and 90s

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Federalism is a form of government ideally suited to accommodate cultural pluralism. It is possible to have a pluralist society without a federal governmental structure, and it is also possible to have federations where the governing structure is primarily an administrative strategy or a historical accident rather than the means to manage diversity. Cultural pluralism, however, where a number of national/ethnic societies coexist, best works if the country has a federal structure. As explicated by Will Kymlicka:

> One mechanism for recognizing claims to self-government is federalism, which divides powers between the central government and regional subunits (provinces/states/cantons). Where national minorities are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society. (27–28)[1]

Rather than focusing on the structure of government and politics *per se*, my study investigates visions rooted in history that manage the cultural/national identity inculcating that structure.

To form the beginning of modern Canada four self-governing colonies united under the British North America Act of 1867 (known as the Constitution Act, 1867) which was the "first federal constitution in the British Empire, and Canada was the first federation to combine a parliamentary regime with the system of responsible government" (Beaudoin 225). The BNA Act set forth the following crucial structural rules: it divided governing powers into federal (section 91) and provincial powers (s.92), with a special article (s.93) allocating education to the provinces and other articles (s.94A and s.95) dealing with concurrent powers. The legislation over Indians and the lands of Indians (s.91[24]) was rendered exclusively to the federal sphere. On the whole, the constitution created a strongly centralized, asymmetric form of federalism, essentially in order to reconcile—as Lord Durham put it—"two nations warring in the bosom of a single state" (qtd. in MacIver 241). Furthermore, the text enshrined judicial review by the Supreme Court to exercise ultimate control over the constitutionality of federal and

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provincial legislation. Eventually in 1982 the British North America Act was patriated, and a Canadian Charter of Rights and Freedoms to protect human rights was additionally entrenched as the new Constitution Act, 1982.

The constitutional imagination, so revitalized in 1982, launched an avalanche of claims to tailor the federation to suit its composing societal groups better. Within a decade, a constitutional move to accommodate Québec—the Meech Lake Accord (1987–1990)—failed, which pushed the country towards a federal and identity crisis, inasmuch as this Accord could not reconcile the interests of national minorities with the interest of the nation as a whole within one legal framework. By the late 1980s, Aboriginal peoples and the Québécois felt increasingly antagonized by the leveling tendencies of multiculturalist ideology because over the years it had become impossible to push nationalist arguments through the wall of liberal egalitarianism. Equality-based multiculturalism, however, has always only been a partial solution to a population management problem; inherent cleavages in the body politic have survived, as continuing clashes over the constitution well into the next decade have demonstrated: most significantly, the Charlottetown Accord of 1992, which ambitioned to reconcile the whole of Canada and then failed in 1994.

Confederation in the 1860s proceeded mostly because the provinces wanted a model of government that would satisfy Quebec, the only French majority province, so that it could maintain extensive jurisdiction over issues that were crucial to the survival of French culture. Yet, efforts a hundred years later to "recognize the reality of Quebec's distinctiveness by increasing constitutional asymmetry have been highly controversial," argues Ronald L. Watts, even if some recognition of political asymmetry was entrenched in 1867 "in provisions relating to language, education and civil law" (24). A distinction between political and constitutional asymmetry (Watts 65–67) needs to be highlighted here: the constitution awards priority to the principle of provincial equality, even if political asymmetry in the confederation has long been undeniable.

The asymmetry of federal power has proved economically, politically, and culturally more advantageous for the English-speaking provinces—so Quebec perceived. After decades of negotiations to rebalance the federal structure failed, Quebec refused to give assent to the patriation of the constitution, thus expressing grievances and demanding historic rights. Although the 1982 constitution was nevertheless legally binding on the dissenting province, politicians decided to reopen federal–provincial negotiations for the sake of political peace. A series of meetings began in 1986

to rebalance federalism and resulted in the Meech Lake Accord (officially named the 1987 Constitutional Amendment), which then failed to pass in each province within a three-year deadline (Manitoba, Newfoundland, and Labrador rejected it, the first of them for the sake of the recognition of indigenous identity politics). With it withered the reconciliation of federal–provincial interests.

One potential problem to be considered in a federal structure is the degree of power-sharing, iconically identified as the "dilemma of Canadian federalism, its essential difficulty" (Beaudoin 225)[2]. In spite of this "essential difficulty," the Meech Lake Accord and the Charlottetown Agreement (the following round of constitutional negotiations in 1992 designed to save Canada) proved that it was possible to reach a compromise (if not to get it passed as law) about the degree of power-sharing between central and provincial governments. These agreements also failed due to other problems inherent in federalism.

With more or less success, until the 1999 enactment of the Inuit self-governing territory of Nunavut, Canadian federalism accommodated only the Québécois as a national unit, whereas Indigenous participating nations never received constitutionally recognized governmental roles arising from an inherent right to self-government. When in *Calder* (1973) the Supreme Court of Canada acknowledged the existence of aboriginal rights based on prior occupation, an ongoing legal, political, and scholarly debate began to determine whether aboriginal rights contain fundamental political rights, such as the right to self-determination. Eventually, in 1992 the Charlottetown Accord's ambition was to entrench a third (Indigenous) order of government into the constitution, but this failed at referendum when the whole of the Agreement did not carry. The motion itself did not wither though: following the recommendations of the Royal Commission on Aboriginal Peoples (1995), the government issued a formal policy entitled "Indigenous Rights to Aboriginal Self-Government" as a basis for redefining state–Indigenous relations (Fleras 202). Most recently, the success of Nunavut in 1999, when the "body" of the constitution incorporated a self-governing territory of the Inuit, demonstrates that federalism in its Canadian manifestation is capable of accommodating some Indigenous claims if historical and political factors coincide. But to reach that far, Canada had to survive a federal crisis, which had demonstrated that the concept of equal citizenship and the vision of a multicultural Canada (the national unity model) following from post-World War II immigration policies and culminating in the Charter of Rights and Freedoms are dubious in a confederation that is multicultural in a double

sense: its modern poly-ethnicity is underpinned by historical multi-nationality.

The Charlottetown Accord introduced a fundamentally new vision of the confederacy by instituting inherent indigenous self-government as the third order of the state. More insight into the other two available options on the political agenda—biculturalism and multiculturalism—helps to understand how new and radical the change that occurred in the federal vision then was. In my view, the Charlottetown Accord dismissed the bicultural and multicultural pan-Canadian sociocultural visions, as well as Pierre Trudeau's multiculturalism in the bilingual framework that stemmed from the marriage of these two. And rightly so, because in the case of such a diverse society, applying a combination of group-differentiated rights/citizenship and individual rights gains extraordinary importance. Similarly to the former sociocultural models (that is biculturalism and multiculturalism), "group-differentiated rights" is also a collective term which covers various legal constructions depending on the model implied. If they were not used, Canada would lose its distinctive and definitive characteristics (political leadership could rightfully be charged by making the country similar to the predominantly individualist USA), and many decades of biculturalism or multiculturalism-in-bilingual-framework policies would go to waste.

The heroic modern age of biculturalism lasted until the early 1970s. Public hearings and published reports of the Royal Commission on Bilingualism and Biculturalism (1963–1970) commanded much media publicity, and "much of the influence of the Commission on public consciousness—on the way people defined and debated French-English and other cultural and linguistic problems—came from these meetings and media reports on them" (Oliver 315–16). The Commission was appointed "to document the sources of the crisis and to suggest paths to a federal future of equality between 'the two founding races'" (McNaught 307). Consequently, substantial research focused on the federal crisis, and it also may have generated a discourse on Canadian identity, to which it gave special emphasis. Besides diagnosis, it may have strengthened the identity crisis, simply by talking about it. Some of the Commission's achievements are the Official Languages Act, 1969; the decision by New Brunswick to turn into an officially bilingual province; radio and television in both languages, transformation of language-learning patterns by flourishing French immersion courses; and the quickly-spread terms "Anglophone" and "Francophone," which shifted the focus of attention from ethnic/national identity to language (Oliver 316).

The mainspring of the Commission was "equal partnership between the two founding races" (Oliver 317) with the propagated notion of equal partnership, being based on the historical ground that the English and the French were founding peoples of Canada. This notwithstanding, the "full concept of equal partnership and its implications for Canadian federalism were . . . never truly explicated," argues Michael Oliver (320), because individual-based interpretations and community-based interpretations could not agree. The English side tended to emphasize individually chosen cultural affiliation as a basis of partnership, whereas the French-Québécois side emphasized the historical rights of a community to be equal partner in the confederacy. Kenneth McNaught makes a similar observation:

> In general the Report also endorses the concept of *deux nations* (in a sociological sense) as the basis of the Canadian federal state, but stops short of basic constitutional changes that would make Quebec *the* nation-state of the French Canadians. Rather, it underwrites the proposition that the English-speaking nation and the French-speaking nation should co-exist on an equal footing everywhere in Canada, while recognising that this ideal will be achieved much more slowly in the west than in the east. (308)

The 1980s, however, brought a shift toward a more deeply engraved "nationhood" in Quebec first during the fight for constitutional acknowledgment of their "distinct society," then in even stronger separatist attempts. Culminating in the mid-1990s, this vision regained impetus after the failure of the Meech Lake Accord, when "the rest of Canada rejected Quebec"—or so they thought. Quebec seemed to act as if the rest of Canada had been a separate country. In 1991-92 separate parliamentary committees were set up to investigate the potential solutions for the future, including in Quebec the Bélanger-Campeau Commission and the Allaire Committee and in Canada the Beaudoin-Edwards and the Beaudoin-Dobbie Special Joint Committees. Referenda were only held in the Rest of Canada after Quebec had decided to have one of its own.

Nevertheless, despite the growing pressure to pacify the Québécois zeal, the following round of constitutional negotiations, held in Charlottetown and nicknamed "Canada-round," apparently dismissed the bicultural model. The Charlottetown Accord deliberately avoided an independent distinct society-clause to describe Quebec, other than the one incorporated within a Canada-clause.[3] (Interestingly, the original proposal, *Shaping Canada's Future Together*, had contained a separately standing section

about Quebec's distinct society with a contextual statement about its content, but during the hearings and negotiations in the parliamentary committees they amalgamated it into the Canada-clause.) Formally, such a structuring of the Accord signaled that although Quebec's distinct society would now be fully acknowledged in the constitution, it still remained only yet another component of the confederacy. The clause itself, which incorporated the wording of Quebec's distinct society, is a so-called interpretive one. In this, the unity-in-diversity principle seems more fundamental than the distinct identity of one particle of the unity, although the existence of this particular distinct particle deserves special protection because it makes the whole of Canada unique as a federation that has "a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition" (Canada, *Consensus* 6, item 1, section 2.[1][*d*]). Although the Canada-clause affirms the "role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec" (section 2.[2]), the implied bilingual nature of the country is not specifically described in the Canada-clause because unity in diversity is more important.[4] Quebec's distinctness is acknowledged, but nowhere in the Accord is it mentioned that this might entitle Quebec to a different or separate kind of self-government from those of the other provinces. This runs counter to the tendency of measures regarding Canada's First Peoples, who received separate mention in the Accord (Part IV: First Peoples), besides being mentioned in the Canada-clause and elsewhere in items about relevant governing institutions.

Certain signs in the Accord, however, implied that biculturalism had not been fully abandoned. Quebec had been entitled to own more power in governing institutions with effect to the following: (1) Quebec holds the right to double majority voting in Senate about "bills that materially affect French language culture" (item 12); (2) that of the nine members of the Supreme Court "three must have been admitted to the bar of Quebec" (item 18); and (3) "a guarantee that Quebec would be assigned no fewer than 25% of the seats in the House of Commons" (item 21). Legal in form and nature, these demands hardly affected culture directly (either as "biculturalism" or as Québec's preferred "interculturalism" in a unilingual nation) but the struggle for them used to be wrapped in the rhetoric of political identity. These allowances were designed to satisfy Quebec's minimal demands (the five-point list of the Meech Lake Accord) that had been kept on the agenda since 1985.

By the mid-1970s, federal Canada had diverged from biculturalism toward multiculturalism, and as a compromise of transition Prime Minister

Trudeau introduced the policy as "multiculturalism within bilingual framework." As Kenneth McNaught reflected on this,

> it was absolutely essential to prove to Quebec that the aspirations of French Canada could find clear and influential expression not only in Quebec City but also in Ottawa. Trudeau especially feared that Quebec *nationalisme* was driving in a racist direction which would not only sunder the Canadian federal state but would also lead the province into a humiliating introversion and semi-fascism. (310–11)

Thus, the intention to prevent Quebec from a potentially racist and xenophobic nationalism, rather than mere humanitarian goodwill, explains Trudeau's multicultural policies. It also explains why the literature posits Trudeau once as a nationalist, other times as a liberal individualist.

Although the scope of Trudeau's vision of a multicultural Canada included aboriginal people, they, to the contrary, struggled successfully to separate from the multicultural model and won major battles on two grounds. First, the physical ground was won at Oka, Quebec, when in July 1990 Mohawks barricaded the construction of a golf course at a field that was under land claim as their ancestral burial site. The blockade could only be dissolved two and a half months later. The event, known as the Oka crisis, involved gun fights between Mohawk warriors and the Quebec provincial police, and the Canadian army was eventually called in. Second, the legal ground of principles was conquered by rejecting the Meech Lake Accord.

All in all, the model offered by the Charlottetown Accord is better described by the term "multiculturalism in bilingual framework" than by "biculturalism," but only if we ignore the indigenous, that is, aboriginal, element. (I claim this is so because the distinct-society clause is subordinated to the Canada-clause.) If, however, we contemplate that aboriginal peoples' third order of government also would (and should) be handled within the symbolic body of the constitution, a curiously amorphous cultural model results (shown in fig.1):

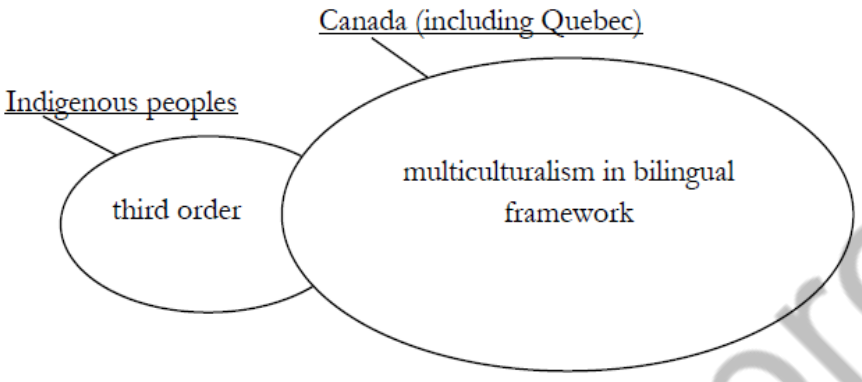

Figure 1. (Source: author)

In this model, presented by the Charlottetown Accord, indigenous self-governments are to develop their own cultural models, because as third order they are responsible for their own cultural identity. This is explicated in the contextual statement of item 41 of the Charlottetown Accord.[5] Any limits on this responsibility are denied in item 40, the non-derogation clause:

> 40. Aboriginal Peoples' Protection Mechanism
> There should be a general non-derogation clause to ensure that division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples.

To take the discussion even further, there are also some more problematic issues pertaining to the model of multiculturalism in the bilingual framework. For one, the term "multiculturalism" does not even occur in the Accord. The Canada-clause, which—in theory—is intended to describe Canada's society, avoids using the unpopular term and substitutes a longish circumnavigation, rather than the policy itself. In this way, socio-demographic reality does not correspond with government policy:

> 2.(1)(*e*) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity[.] (Canada, *Consensus* 6)

For two, item 29 of the Charlottetown Accord relegates culture exclusively into provincial hands,[6] which ultimately questions the strength of the position of the federal Multiculturalism Act. The Canadian Multiculturalism Act, however, gives a wide range of powers (recognition, promotion, encouragement, and assistance) to federal institutions and the minister, implying nationwide impact, which in many fields may clash with the exclusive provincial power delegated in the Accord. For example, to "encourage and assist the business community, labour organizations, as well as public institutions, in ensuring full participation in Canadian society, including the social and economic aspects . . ." (CMA section 5.(1)(*d*)), or to "facilitate the acquisition, retention and use of all languages that contribute to the multicultural heritage of Canada" (CMA s.5.(1)(*f*)) might not be welcome all around the country and across all provinces. Especially so because in the meanwhile—during the period between the effective date 1988 of the Multiculturalism Act and the would-be effective date 1992 of the Charlottetown Accord—the federal government also gave up its position in the labor market and training by relegating them into exclusive provincial jurisdiction in item 28 of the Accord. These latter fields are important for incorporating new migrants into the community. All in all, the notion of multiculturalism still enjoys protection under the Charter of Rights and Freedoms (Constitution Act, 1982), but the implementation of the policy has remained controversial due to the rearranged federal-provincial jurisdictions outlined above.

No matter how radically new and welcome the proposal of an Indigenous third order (self-government) in the Charlottetown Accord was, the texture of the document remained rather uneven. It could not take sides with any clear-cut cultural model, yet it turned this drawback to advantage inasmuch as an accord could be negotiated. In "Canada's interest" the text tried to satisfy all parties (including Indigenous peoples), but at the same time it ignored, or failed to preconceive, that they no longer shared a unanimous understanding of, let alone support for, "Canada's interest." This became evident when the referenda on the Charlottetown Accord produced majority "No" votes in Quebec and the Western provinces (55% of all Canadians), and majority "Yes" votes in Ontario, the Atlantic provinces, and the Northwest Territories (45% of all Canadians) (Molnár 143). Canada's supreme sovereignty and the importance of an all-Canadian identity seem to have been prioritized by all the major partners, but they disagreed about the cultural model that could substantiate it. For this reason the Charlottetown Accord carried the fingerprints of all cultural models favored by any

component of the Canadian reality: self-government for aboriginal peoples, biculturalism for Quebec, multiculturalism within bilingual framework for the Atlantic and Western provinces, and unity in diversity for the federal government, as shown in fig. 2.

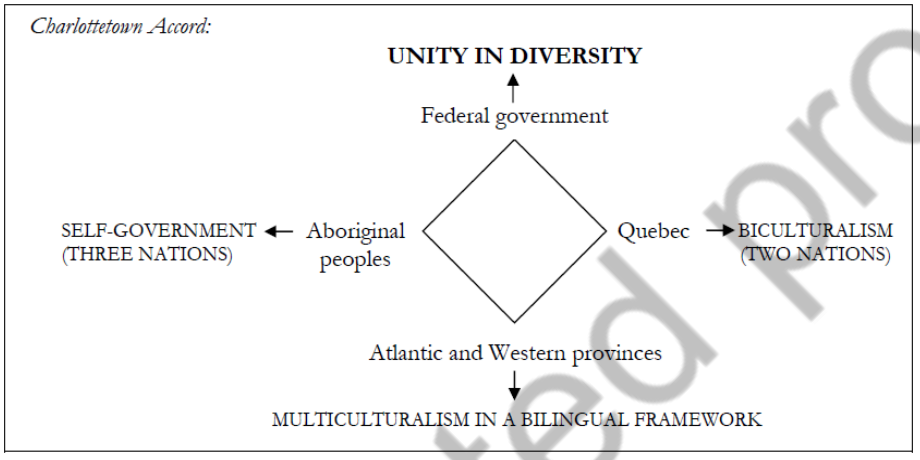

Figure 2. (Source: author)

Such a disheveled nature of the implied text of the Accord and the failure of the attempts directed at constitutionalizing it (that is, the unsuccessful referenda) steered Canada toward parallelism in the mid-1990s. The Charlottetown Accord, however, offers a reading that leads to a different conclusion. The Accord can be regarded as Kymlicka's theory about minority rights (explicated in *Multicultural Citizenship*) being realized. If we consider the triple distinction within Kymlicka's concept of "group-differentiated rights" (self-government rights, polyethnic rights, special representation rights), it turns out that each societal culture in the Charlottetown Accord (as a result of many years' struggle) gained exactly what their national or ethnic identity in the confederacy entitled them to. If the federal government as director of the negotiations had been able to carry out the theory consistently in the Accord (by omitting the asterisked exceptions, for example), then a more enlightened healing might have started.

At this point, however, we encounter another problem: to what extent should the academic elite influence policymaking? Ironically, however much the need for leadership was emphasized throughout the constitutional negotiations, those who took up the role could easily find themselves labeled

"elitist, anti-democratic bunglers." Pierre Trudeau, no longer in office, criticized political and academic actors in the constitutional drama as such, both at the Meech and Charlottetown stages. There might be some truth in his publicly aired and widely shared opinion if we consider, as Richard Mulgan points out, that willingness to take on some imagined guilt for past injustices is restricted to a limited section of society for moralistic reasons: "Moralising liberals are particularly prone to take on moral responsibility for the sufferings of others and are very comfortable with feelings of 'collective self-reproach'" (185). Still, emotions excluded, stakeholders in public opinion formation outside politics—the courts and the intelligentsia being the two most significant ones—have gained increasing power via litigation and negotiation recently. A detailed discussion of their function in the constitutionalizing process, however, would reach far beyond the scope of this essay.

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Notes

[1] See also Geoffrey de Q. Walker, "Rediscovering the Advantages of Federalism," *Papers on Parliament* 35 (Canberra: Dept. of the Senate, 2000) 17–40.

[2] Lawyer and law professor, senator, joint chairman of two special constitutional joint committees of the Parliament of Canada in 1991-92.

[3] It was a major development compared to the less specific wording of the Meech Lake Accord that the Charlottetown version defined the content of the distinct-society clause: "2.(1)(*c*) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition." Yet, formally this clarification remained within the Canada-clause, not standing independently in a separate section.

[4] The Charter, which was not modified in the Canada-round, already contains the protection of official bilingualism.

[5] "The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:

(*a*) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,

(*b*) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies." (Canada, *Consensus* 15, Item 41)

[6] "Provinces should have exclusive jurisdiction over cultural matters within the provinces. This should be recognized through an explicit constitutional amendment that also recognizes the continuing responsibility of the federal government in Canadian cultural matters. The federal government should retain responsibility for national cultural institutions. The Government of Canada commits to negotiate cultural agreements with provinces in recognition of their lead responsibility for cultural matters within the province and to ensure

that the federal government and the province work in harmony . . . ." (Canada, *Consensus* 15, Item 29: Culture)

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